Supreme Court, U.S.
FILED
MAY 9 2001
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(2)

No. 00-1540

IN THE

Supreme Court of the United States

CLAUDINE W. JORDAN, on behalf of herself and all others similarly situated,

Petitioner,

v.

TOYOTA MOTOR CREDIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Toyota Motor Credit Corporation, is a wholly owned subsidiary of Toyota Motor Sales, U.S.A.

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REASONS FOR DENYING THE WRIT

The Petitioner's request for writ of certiorari should be denied because no conflict exists among the United States Courts of Appeals. Furthermore, the Respondent, Toyota Motor Credit Corporation ("TMCC"), objects to the question presented for review by the Petitioner because it does not accurately represent the holding of the Seventh Circuit. Specifically, the Petitioner's chief contention is that the Seventh Circuit incorrectly held that the clear and conspicuous disclosure requirement of the Consumer Leasing Act (15 U.S.C. § 1667a(11)) lacks an understandability component and only requires that lease terms be visible to a consumer. The Petitioner contends that this holding is contrary to the Third Circuit's holding in *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3646 (Mar. 23, 2001) (No. 00-1484), which held that the word "clear" also meant reasonably understandable.

The Petitioner's characterization of the Seventh Circuit's opinion is inaccurate. Specifically, in holding that TMCC's early termination provision did not violate the Consumer Leasing Act ("CLA"),[1] the Seventh Circuit expressly agreed with *Applebaum* "that the word 'clear' could mean 'easily understood' or some variant." (A. 25). The court further reasoned that it was required to follow the cardinal principle of statutory construction, *i.e.*, the degree to which complex concepts must be presented in "easy-to-follow language (if that is possible at all) is a question for the Federal Reserve." (A. 26). Thus, no conflict exists between the Seventh and Third Circuits.

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1. The Consumer Leasing Act is a part of the Truth in Lending Act ("TILA") and thus, they will be used interchangeably throughout this brief in opposition.

Furthermore, no conflict exists between the Seventh Circuit and the Second Circuit's opinion in *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993), *cert. denied*, 510 U.S. 959 (1993). The *Lundquist* court held that the early termination provision which referenced the "constant yield" method was "confusing, unduly complicated and unnecessarily convoluted," and thus violated the CLA. *Lundquist* cited no authority for its holding and contained no analysis. In 1996, three years after *Lundquist* was decided, the Federal Reserve Board issued the final version of its revisions to Regulation M and expressly approved reference to the "constant-yield" method of calculating early termination in a consumer lease. 12 C.F.R. § 213, Supp. I, 213.4(g)(1). The Federal Reserve Board approved this type of disclosure even though the average consumer would not comprehend the math involved. Therefore, *Lundquist* is outdated and is no longer relevant to a discussion of the CLA.

Additionally, the petition for writ of certiorari should be denied because the Petitioner failed to raise several arguments in the district court or the Seventh Circuit. The Petitioner also conceded certain arguments during oral argument before the Seventh Circuit which are inconsistent with arguments made before this Court, and which will inhibit this Court's review of the issues raised in the Petitioner's brief. Indeed, the Petitioner's brief filed in this Court contains internal inconsistencies. For all of these reasons and for those set forth below, the petition for writ of certiorari in this case should be denied.

BACKGROUND

Petitioner's "Statement of the Case" omits information. Accordingly, the Respondents have set forth below a brief background to supplement the facts set forth in the Petitioner's Brief.

In February 1997, the Petitioner turned over her leased 1993 Toyota Corolla to a car dealer, Schaumburg Toyota ("Schaumburg"). (DE 1). She then executed a new 36-month lease with Schaumburg for a 1997 Toyota Camry. *Id.* The lease was then assigned to Toyota Motor Credit Corporation ("TMCC"). TMCC provides leasing, loan financing, and other financial services to car buyers.

The Petitioner's 1997 lease provided two options for terminating the lease before the conclusion of the 36-month lease term: (1) the Petitioner could purchase the Camry and pay TMCC the Amount Due on Early Termination or (2) she could pay the Amount Due on Early Termination minus the Fair Market Value of the Camry. (DE 40, Ex. C). The lease also provided the method by which the Amount Due on Early Termination is calculated. *Id.* The lease referenced the "constant yield" method as permitted by the Federal Reserve Board. Specifically, the lease provided:

> 26. **Amount Due on Early Termination.** The Amount Due on Early Termination is the sum of a. through d. minus e.:
>
> a. Any unpaid Monthly Payments then due;
>
> b. Any other amounts you are obligated to pay under this Lease;

c. Any official fees and taxes owing, or imposed in connection with lease termination;

d. The Adjusted Capitalized Cost (Paragraph 6);

e. All depreciation amounts in the Base Monthly Payments that have come due (Paragraph 28).

Paragraph 28 of the lease provides, in relevant part:

28. **Depreciation Amounts:** Each Base Monthly Payment consists of Lease Charges and depreciation. Lease Charge is earned by us on a "constant yield" basis. The Lease Charge part of each Base Monthly Payment is determined by:

a. Adding the remaining depreciation balance and the Residual Value;

b. Subtracting from that sum an amount equal to 1 Base Monthly Payment; and

c. Multiplying the difference determined in step b. above by the constant rate which will amortize the Total Depreciation over the Lease Term by the payment of the Base Monthly Payments.

Cross referencing in this manner to avoid unnecessary text is expressly permitted by the Federal Reserve Board as shown by the Commentary to Regulation M, which governs the interpretation of the CLA. *See* Comment 2 Reg. M, 213.4(a)-3.

On September 23, 1997, the Petitioner sued Schaumburg and TMCC for alleged violations of the disclosure requirements of the CLA. 15 U.S.C. § 1667a(11). In Count I, the Petitioner claimed that her new lease did not clearly and fully disclose the early termination penalty in violation of the CLA. (DE 1, at 5). In Count II, she alleged that TMCC violated the CLA by failing to disclose the trade-in value of her leased 1993 Toyota Corolla, as well as certain unspecified "other" charges. (DE 1, at 6). Counts III and IV were directed at Schaumburg only. Ultimately, the Petitioner settled with Schaumburg and the district court dismissed the claims against Schaumburg with prejudice. (DE 27).

TMCC moved to dismiss Counts I and II of Petitioner's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. With respect to Petitioner's early termination claim in Count I, TMCC argued that the lease disclosure fully complied with the CLA and the Federal Reserve Board's Regulation M. (DE 18, at 2; DE 24 at 4-6). TMCC also argued for the dismissal of the remaining claims against it. (DE 18 & 24).

In response, the Petitioner filed a cross-motion for summary judgment on Count I of her complaint. (DE 21, 25). The Petitioner maintained that TMCC's motion to dismiss was, in actuality, a motion for summary judgment. (DE 21, at 6, n.7). TMCC moved to strike the Petitioner's cross-motion for summary judgment because it was premature and because dismissal under Rule 12(b)(6) was appropriate. (DE 19).

On February 26, 1999, the district court entered its order granting, in part, TMCC's motion to dismiss Counts I

and II, and denying the Petitioner's motion for summary judgment as premature. The district court held that under *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379, 382 (7th Cir. 1996), the Petitioner failed to state a claim for violation of the CLA based upon the disclosure of the early termination methodology in the lease. *Jordan v. Schaumburg Toyota*, No. 97 C 6697, 1999 WL 116224, at *6-7 (N.D. Ill. Feb. 26, 1999). The court also held that the Petitioner failed to state a claim in Count II for the failure to accurately disclose unspecified "other" charges, and that the Petitioner could not obtain punitive damages against TMCC because the CLA does not authorize such damages. The only two surviving claims concerned the alleged typographical error in the lease (Count I) and the alleged failure to disclose the trade-in value of the leased 1993 Corolla (Count II).

Following discovery, TMCC moved for summary judgment on the two remaining claims, *i.e.*, typographical error (Count I) and trade-in (Count II). (DE 39, 40). The Petitioner responded by filing a cross-motion for summary judgment. (DE 41, 42).

On April 25, 2000, the district court entered summary judgment in favor of TMCC and against the Petitioner. (DE 47-48). With respect to the typographical error, the district court noted that the Petitioner admitted that she realized that the actual "Adjusted Capitalized Cost" was found in paragraph 5, not paragraph 6. (A. 20-21). The court reasoned that the meaning was so readily apparent that no reasonable juror could conclude that a reasonable consumer would be mislead by the typo, and thus no violation of the CLA occurred. (A. 21). The district court also held that the manner in which TMCC disclosed the trade-in value did not violate the CLA. (A. 22).

The Petitioner timely appealed to the Seventh Circuit and raised only one issue: whether the district court properly dismissed the early termination aspect of Count I. The Petitioner conceded that the early termination language in TMCC's lease was conspicuous, but she denied that it was clear unless the average consumer can understand how the method works. For the reasons set forth below, the Seventh Circuit correctly rejected the Petitioner's arguments and affirmed the district court's dismissal of her complaint.

ARGUMENT

I. NO CONFLICT EXISTS BETWEEN THE UNITED STATES COURTS OF APPEALS IN INTERPRETING THE CONSUMER LEASING ACT.

As shown by a careful reading of *Channell v. Citicorp Nat. Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), *Jordan v. Toyota Motor Credit Corp.*, 236 F.3d 866 (7th Cir. 2001), *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000) and *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993), no conflict among the United States Courts of Appeals exists. The Petitioner casts the Seventh Circuit's opinion in this case as approving the disclosure of early termination provisions that are not comprehendible or accurate. (Petition at 6). This is not true. The Seventh Circuit properly construed the CLA by following the applicable Federal Reserve Board regulations and commentary regarding early termination provisions in leases. Furthermore, no conflict exists because the Seventh Circuit expressly agreed with the Third Circuit's decision in *Applebaum*. Additionally, the Second Circuit's 1993 decision in *Lundquist* has become obsolete given the evolution of the Federal Reserve Board's regulations and commentary which post-date *Lundquist*.

A. The Federal Reserve Board Has Expressly Approved The Use Of Early Termination Terms That Are Not Within The General Understanding Of The Average Consumer, And This Decision Is Entitled To Deference.

The Seventh Circuit's decision conforms with the purpose of the TILA. The purpose of the TILA is to promote the informed use of credit and to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S. Ct. 1652 (1973); *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555, 100 S. Ct. 790 (1980). This Court has cautioned that where reasonable minds may differ as to appropriate remedial measures courts should defer to the agency to whom Congress has delegated authority — in the case of the TILA, the Federal Reserve Board. *Id.* Congress gave the Federal Reserve Board the power to construe the TILA and enact regulations because the Board has the necessary experience, resources, and administrative expertise to monitor the operation of the TILA. *Id.*

This Court has discouraged judges from superseding Congress or the Federal Reserve Board by embellishing on the regulatory scheme set up by the Board. *Milhollin*, 444 U.S. at 564. The legislative history of the TILA evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than through piecemeal litigation. *Id.* at 566. As this Court has noted:

> [S]triking the appropriate balance is an empirical process that entails investigation into consumer

> psychology and that presupposes broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.

Id. at 568-69.

Based on its power under the TILA, the Federal Reserve Board has expressly approved reference to the "constant yield" method as part of an early termination equation in a consumer lease, even though the average consumer has no idea what that method may entail. The Board has refused to limit the substantive calculations that lessors may use for calculating early termination in a lease, and thus has not required lessors to use simple math terms that average consumers comprehend. As the Federal Reserve Board regulations illustrate, a vehicle lessee voluntarily enters into the market place and has a choice about whether to engage in comparison shopping for a leased vehicle. Because the nature of leasing is inherently math based, and must account for the time-value of money, the CLA, Regulation M, and the corresponding decisional law have recognized that a consumer's comprehension of all math terms need not be complete. Indeed, consumer comprehension of all math terms would be an impossibility.

B. In This Case And *Channell* The Seventh Circuit Properly Interpreted The Consumer Leasing Act and Regulation M Consistent With The Third Circuit's Decision in *Applebaum v. Nissan Motor Acceptance Corporation.*

Based on the above principles, the Seventh Circuit in this case and in *Channell* held that the early termination provisions at issue contained disclosures that were adequate for purposes of the CLA, even though only a rare consumer would be able to do the math involved. In each case, the Seventh Circuit considered the Federal Reserve Board's revisions to Regulation M and the Board's decision to permit reference to complex mathematical terms. *See, e.g.*, 60 Fed. Reg. 48752, 48756 (Sept. 20, 1995); *Channell*, 89 F.3d at 382-83; *Jordan*, 236 F.3d 866. At the time of *Channell* in 1996, proposed revisions to Regulation M were published for comment and were under consideration. By the time the present case came before the court in 2000/2001, the revisions had been approved and thus had become law. In each case, the Seventh Circuit merely applied disclosure methods approved by the Federal Reserve Board to the early termination provisions at issue. In doing so, the Seventh Circuit served an appropriate judicial function by deferring to the Federal Reserve Board's expertise with respect to consumer leasing practices, and by refusing to place substantive restrictions upon the manner in which a lessor may provide for early termination under a lease.

Specifically, in *Channell*, the Seventh Circuit held that the reference to the "sum-of-the-digits" method in an early termination provision of a lease satisfies the CLA's requirement that early termination disclosures must be clear and conspicuous. 15 U.S.C. § 1667a(11); 12 C.F.R. § 213.4(g)(2). The *Channell* court reasoned that according to the Federal Reserve Board,

the "clear and conspicuous" requirement of section 1667a(11) of the CLA does not require a lease's terms to be simple. *Id.* at 382. The lease in *Channell* required the lessor to use the "sum-of-the-digits" method to determine the early termination penalty, but it did not define "sum-of-the-digits" and it did not explain how this term operated. *Id.* at 380. The *Channell* court noted that the term "manner" in section 1667a of the CLA refers to the "mode of presentation, not the degree of comprehension." *Id.* at 382. The court further noted that the Federal Reserve Board revisions to Regulation M that were under consideration expressly permitted lessors to give a full description of its early termination method, and, in doing so, to include a reference to the name of the generally accepted method of computing the unamortized gross or capitalized cost (also known as the "adjusted lease balance") portion of the early termination charge. *Id.*

In reaching its conclusion that the early termination provision satisfied the CLA, the Seventh Circuit analogized the lease provision to the Uniform Commercial Code ("UCC"), which requires the conspicuous disclosure of a disclaimer of the warranty of merchantability "even if the average consumer hasn't the vaguest idea what a 'warranty of merchantability' entails." *Id.* at 382. The *Channell* court also observed that "[a] reference in a lease to the sum-of-the-digits method is not highly informative, but it is more than the Board requires in loan transactions." *Id.* Even though the early termination provision at issue in *Channell* was not simple, the court found that it satisfied the CLA because it conformed to the guidelines set forth by the Federal Reserve Board.

Similarly, in this case the Seventh Circuit followed *Channell*, agreed with *Applebaum*, and held that TMCC

complied with section 1667a(11) of the CLA by disclosing the method it uses to calculate the "Amount Due on Early Termination," even though that method may be complicated. The court reasoned that the Federal Reserve Board does not require lessors to make early termination calculations easy or decipherable by the average consumer. The Seventh Circuit observed that the Federal Reserve Board is charged with the responsibility of determining the degree to which it is necessary for lessors to present complex mathematical concepts in easy to follow language (if that is possible). (A. 26). The Seventh Circuit reasoned that the Federal Reserve Board decided that the reference to the name — "constant-yield method" — satisfies the TILA and the Board's regulations, "even if the average consumer hasn't a clue what the 'constant yield method' entails." (A. 26). It is beyond the role of the judiciary to second guess this decision.

The Seventh Circuit also rejected the Petitioner's argument that TMCC's lease violates the TILA because it does more than give the method's name. The court reasoned that the Petitioner's argument presumed that a better explanation of complex mathematical terms could be crafted. The Seventh Circuit seized upon the concession the Petitioner made during oral argument–that he was unable to craft a better explanation of early termination than the one provided by TMCC. (A. 26). The Seventh Circuit then recommended that consumers perhaps would be assisted by being given the location of an Internet site that would perform the calculations for the inquiring lessee. The court, however, also observed that neither the TILA nor the Federal Reserve Board's regulations require leasing information to be delivered to consumers electronically in this fashion. In sum, the court concluded that the added explanation provided by

TMCC was not substantively any more confusing to a consumer than the methods already approved by the Federal Reserve Board — namely, the use of an unelaborated name of a calculation such as the "constant yield" method. Therefore, the court held that no violation of the TILA occurred. (A 25-26).

As in the present case, in *Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214 (3d Cir. 2000), the Third Circuit ruled that the reference to "the Constant Yield method at the rate implicit in the lease" in the early termination clause did not violate the CLA even though average consumers have no idea what this entails. The court explained the word "clear" in section 1667a means that the provision must be reasonably understandable. *Applebaum*, 226 F.3d at 221. In further analyzing the application of this standard, the Third Circuit explained that the CLA and Regulation M require disclosure in a form that is "reasonably understandable" in light of the inherent difficulty or complexity of the method described and thus they do not necessarily demand disclosure in a form that the average consumer can understand. *Applebaum*, 226 F.3d at 221.

The Third Circuit further reasoned that methods used in calculating early termination penalties involve math that is well beyond the understanding of the average consumer. Thus, if the early termination penalty had to be capable of being explained in a way that the average consumer could understand, these provisions would, in effect, impose improper substantive restrictions on such methods. *Applebaum*, 226 F.3d at 221. This rationale is logically sound and entirely consistent with the Federal Reserve Board's regulations and its refusal to place substantive limitations on lessors' early termination provisions.

Ultimately, the Third Circuit found that the early termination clause at issue there violated the CLA because it did not disclose the amount of the residual value. TMCC's lease in this case does not suffer from this shortcoming. In this respect, *Applebaum* is distinguishable from this case, and certainly does not present a conflict with the Seventh Circuit as the Petitioner wrongly suggests.

C. The Second Circuit's Opinion In *Lundquist* Is Outdated, Limited To Its Facts And Poses No Conflict With The Decisional Law Of The Seventh And Third Circuits.

The Petitioner contends that the Second Circuit Court of Appeal's decision in *Lundquist v. Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993) conflicts with the Seventh Circuit's decision in this case and in *Channell*. The Petitioner overlooks the fact that the 1993 decision in *Lundquist* preceded the evolution of leasing practices and the Federal Reserve Board's response through its amendments after *Lundquist* was decided. The *Lundquist* court held that the early termination provision which referenced the "constant yield" method was "confusing, unduly complicated and unnecessarily convoluted," though it cited no authority for its holding and contained no analysis. In 1996, three years after *Lundquist* was decided, the Federal Reserve Board issued the final version of its revisions to Regulation M, and gave the following explanation of the changes:

> The proposed rule noted that a U.S. Court of Appeals case, *Lundquist v. Security Pacific Automotive Services Corp.*, 993 F.2d 11 (2nd Cir.), *cert. denied*, 510 U.S. 959 (1993), caused

> lessors concern in determining the requirements for disclosing their early termination provisions. In that case, the court held a lessor liable for violating the "reasonably understandable" standard for disclosure under Regulation M; the lessor had an early termination formula that the court found to be overly complex and beyond the understanding of the average consumer. Many lessors believe that, given the complexity of modern automobile lease transactions, it is difficult to describe every part of an early termination formula in terms clearly understandable to consumers.
>
> * * * *
>
> Given the complexity of the methods involved, however, a lessor is permitted — in giving the full description of its early termination method — to refer by name to a generally accepted method of computing the adjusted lease balance (also known as the unamortized capital cost) for purposes of the early termination charge. For example, a lessor may state that the "constant yield" method will be utilized in determining the unamortized portion of the gross capitalized cost . . .

61 F.R. 52246, 52252 (10/7/96) (emphasis added). Then, when the Board issued its Official Staff Commentary to the revised Regulation M, it specifically stated: "Descriptions that are full, accurate, and not intended to be misleading will comply with § 213.4(g)(1), even if the descriptions are complex." 62 F.R. 16053, 16061 (4/4/97) (emphasis added).

In light of the Federal Reserve Board's changes to Regulation M and its express consideration of *Lundquist*, the Second Circuit's holding in *Lundquist* is very limited and clearly distinguishable from the present case. As the Seventh Circuit recognized in *Channell*, "[f]or current purposes, it is enough to say that *Lundquist* does not analyze or address the question whether the Act and Regulation M permit a lessor to name a method without providing an elaboration of the method's operation. We hold that it does." *Channell,* 89 F.3d 379, 383 (emphasis added). For these reasons, it is clear that no conflict exists between the Seventh and Second Circuit's interpretations of the CLA, Regulation M, and the Federal Reserve Board's commentary. To the contrary, the *Lundquist* decision is simply obsolete and irrelevant.

II. REVIEW OF THIS CASE WOULD BE INHIBITED BY WAIVED ARGUMENTS AND INTERNAL INCONSISTENCIES IN THE PETITION.

In addition to the fact that no conflict exists among the United States Courts of Appeals, the petition for writ of certiorari should be denied because inconsistent arguments, incomplete allegations, and waiver plague the record to such a degree that this Court's review of this case would be unduly inhibited.

For example, before the Seventh Circuit, the Petitioner argued that the clear and conspicuous requirement of the CLA has an "understandability" component. (Petitioner's Seventh Circuit Brief at 21). In place of the standards for clear and conspicuous set forth in *Channell*, the Petitioner suggested a standard that is completely unclear, *i.e.*, that the early termination method must be "somewhat understandable."

(Petitioner's Seventh Circuit Brief at 10). Indeed, at oral argument before the Seventh Circuit the Petitioner conceded that she could not craft a more understandable method of explaining the early termination provision at issue. (A. 26). The Petitioner's inability to articulate a standard before the Seventh Circuit underscores the fact that the Petitioner seeks to substantively limit TMCC's leasing practices. The Petitioner's concession and different argument before the Seventh Circuit poses a waiver problem.

Furthermore, on the one hand the Petitioner contends that it is "impossible" to calculate the early termination provision in her lease. (Petition at 12). Yet, on the other hand the Petitioner contends that indeed it is possible to reach the correct answer for early termination using esoteric techniques of differential calculus, such as Newton's Method. (Petition at 13). The Petitioner continues to challenge the complexity of the lease's early termination methodology despite the fact that the Federal Reserve Board clearly permits complex mathematical equations to be used in leasing practices.

Additionally, under the revised Commentary to Regulation M, if a lessor discloses only its method of calculating early termination liability, the lessor must provide a written explanation of the method upon request from the lessee. In this case, the Petitioner has never alleged that she asked for an explanation of the early termination calculation. *See* 62 F.R. 16053, 16061 (4/4/97). The Petitioner likewise has never alleged that TMCC's disclosure prevented her from comparison shopping for another leased vehicle or that she even attempted to comparison shop. Thus, the Petitioner's allegations appear incomplete. For these additional reasons, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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